

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VERNON WHITE
Claimant

VS.

STRICKLAND CONSTRUCTION COMPANY
Respondent

AND

GRANITE STATE INSURANCE COMPANY
Insurance Carrier

Docket No. 183,532

ORDER

Respondent has appealed the July 5, 1995, Award entered by Administrative Law Judge Shannon S. Krysl.

APPEARANCES

Claimant appeared by his attorney, Jeffry Jack of Parsons, Kansas . Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and has adopted the stipulations listed in the Award.

Respondent argues there should be one additional stipulation relating to the extent of claimant's functional impairment. Respondent points to the transcript of regular hearing where the Administrative Law Judge indicated that, at the prehearing settlement conference, the parties stipulated that claimant has an 8 percent functional impairment. Claimant's submission letter states, however, that this was a misunderstanding, that claimant intended to stipulate to Dr. David King's opinion that claimant has an 8-10 percent functional impairment. The submission letter also indicates that following Dr. King's deposition claimant would stipulate to a 10 percent functional impairment. Although the Award makes no mention of any change in the stipulations, the Award also does not list a stipulation regarding functional impairment. The Appeals Board, therefore, agrees with the stipulations as stated in the Award and, in effect, agrees there was no stipulation regarding the extent of claimant's functional impairment.

ISSUES

Respondent has asked the Appeals Board to determine the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment.
- (2) Whether claimant gave timely notice and, if not, whether prejudice has been established.
- (3) The nature and extent of claimant's disability, if any, and compensation due therefor.
- (4) Whether there was an overpayment of temporary total disability compensation in the amount of \$2,026.73.
- (5) The amount of claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant testified that he injured his back on March 3, 1993, when he slipped and fell on a muddy board while carrying bricks. Claimant later advised health care providers that the injury was not work related. During the trial of this claim he testified that he told health care providers it was not work related because he was afraid of the consequences to his employment.

The Appeals Board agrees with and adopts the finding by the Administrative Law Judge that claimant's injury did arise out and in the course of his employment. The Appeals Board finds claimant's description of the events to be credible. The Appeals Board gives some deference to the fact that the Administrative Law Judge had the opportunity to observe the way claimant testified at both the preliminary hearing and the regular hearing. See Kroger Co. v. Morris, 14 Va. App. 233, 415 S.E. 2d 879 (1992); Gale v. Hefty's Corp., 46 Or. App. 809, 613 P.2d 108 (1980). Finally, claimant testified to previous problems he had from filing workers compensation claims against the respondent. For this combination of reasons the Appeals Board finds that claimant has met his burden of establishing accidental injury arising out of and in the course of his employment.

The Appeals Board notes parenthetically that in the trial before the Administrative Law Judge respondent contended claimant was an independent contractor, not an employee. The Administrative Law Judge found that the relationship of the employer/employee existed on the date of accident and the respondent has not appealed that finding. The Appeals Board, therefore, adopts and affirms the finding by the Administrative Law Judge that claimant was an employee at the time of the injury.

(2) The Appeals Board finds claimant did give timely notice to Mr. Forrest Strickland of his accidental injury. The Appeals Board also agrees with and affirms the finding that notice to Mr. Strickland acted as notice to respondent Strickland Construction Company.

Respondent argues that notice to Mr. Strickland was not adequate because claimant indicated at the time he believed he did not need medical treatment. K.S.A. 44-520 requires notice of the accident. Claimant's statement to Mr. Strickland that he had slipped and fallen satisfies that requirement.

(3) The Appeals Board finds that claimant sustained a 20 percent permanent partial general disability and the decision by the Administrative Law Judge on this issue should be affirmed. Claimant's injury resulted in a herniated disc at L5-S1. Dr. King performed the surgery and concluded that the injuries left claimant unable to return to his employment as a brick layer.

Ms. Karen Crist Terrill provided the only expert opinion regarding the effect of the injury on claimant's ability to earn a comparable wage and his ability to obtain employment in the open labor market. She gave opinions that claimant had a 40 percent loss of access to the open labor market and a 25 percent loss of ability to earn a comparable wage. After reviewing videotapes and considering the record as a whole, the Administrative Law Judge concluded claimant had exaggerated his complaints both to Dr. King and in his testimony. The Appeals Board agrees and, therefore, also agrees with the finding that claimant has the ability to earn \$8 per hour as he was at the time of the injury. As a result he has a zero percent loss of ability to earn a comparable wage. Nevertheless, the Appeals Board concludes claimant sustained a 40 percent labor market loss. In spite of the conclusion claimant had exaggerated his complaints, the Appeals Board agrees with the opinion by Ms. Terrill, regarding labor market loss, because claimant's work history has been limited to heavy manual labor and he has an eighth grade education. Giving equal weight to the labor market and wage loss components, claimant has a 20 percent work disability.

(4) The Appeals Board finds claimant is entitled to a total of 87 weeks temporary total disability. This includes the period from March 3, 1993, the date of claimant's injury, to November 3, 1994, the date Dr. King determined claimant had reached maximum medical improvement. Respondent argues that claimant was overpaid temporary total disability benefits because he was paid for 53 weeks at the rate of \$213.34, for a total amount of \$11,307.02. However, respondent's argument rests primarily on the amount of claimant's average weekly wage. For the reasons stated below, the Appeals Board has found claimant's average weekly wage to be \$320 and the temporary total disability rate would be \$213.34.

(5) The Appeals Board finds claimant's average weekly wage is \$320 per week. Respondent contends claimant was a part-time employee and his average weekly wage was \$120. The Appeals Board, however, found at the time of the preliminary hearing and again finds here that claimant was a full-time employee as that term is defined in K.S.A. 1992 Supp 44-511. Claimant did not work a 40-hour week because of rain and other factors but was expected to do so and should be considered a full-time employee. His \$8 per hour wage yields a \$320 average weekly wage.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated July 5, 1995, should be, and is hereby, affirmed in part and modified in part as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Vernon White, and against the respondent, Strickland Construction Company, and its insurance carrier, Granite State Insurance Company, for an accidental injury which occurred March 3, 1993, and based upon

an average weekly wage of \$320 for 87 weeks of temporary total disability compensation at the rate of \$213.34 per week or \$18,560.58, followed by 328 weeks of permanent partial general body disability at the rate of \$42.67 per week or \$13,995.76, for a 20% permanent partial work disability, making a total award of \$32,556.34.

As of November 15, 1996, there is due and owing claimant 87 weeks of temporary total disability compensation at the rate of \$213.34 per week or \$18,560.58, followed by 106.29 weeks of permanent partial compensation at the rate of \$42.67 per week in the sum of \$4,535.39 for a total of \$23,095.97. The remaining balance of \$9,420.37 is to be paid for 221.71 weeks at the rate of \$42.67 per week, until fully paid or further order of the Director.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Karen Starkey, CSR Transcript of preliminary hearing	Unknown
Victoria A. Coomes, CSR Deposition of Vernon C. White	\$451.60
Debra Oakleaf, CSR Transcript of Regular Hearing	\$346.20
Deposition Services Deposition of Steven Strickland	\$ 83.00
Deposition of Forrest Strickland	\$167.00
Deposition of Charles Harkins, III	\$212.20
Heather A. Lohmeyer, CSR Deposition of David O. King, D.O.	Unknown

Barber & Associates
Deposition of Karen Crist Terrill

\$233.20

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffry Jack, Parsons, KS
Kim R. Martens, Wichita, KS
Administrative Law Judge, Wichita, KS
Philip S. Harness, Director